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No. 252

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES, PETITIONER

v.

ARTEMUS C. WELLS ET AL., EXECUTORS OF THE ESTATE OF JOHN W. WELLS

ON A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Court of Claims (R. 29–37) is reported in 69 C. Cls. 485, and in 39 F. (2d) 998.

JURISDICTION

The judgment of the Court of Claims was entered on April 7, 1930. (R. 38.) The petition for a writ of certiorari was filed July 3, 1930 (R. 38), and the writ was granted on October 13, 1930 (R. 39). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in determining the taxable estate of a decedent, under Section 402 (c) of the Revenue Act of 1918, the value of a material part of his property, transferred by him to his children within two years prior to his death as advancements, should be excluded as not having been made in contemplation of death because a reasonable fear of immediate death arising out of some existing bodily or mental condition or impending peril was not the direct and only cause of the transfer.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*, pp. 30–31.

STATEMENT

John W. Wells, a resident of Michigan, died testate on August 17, 1921, at the age of 73 years. (R. 14.) Within two years prior to his death the decedent made three transfers, of the aggregate value of $782,903, to his children without consideration. (R. 28.) These transfers constituted approximately half, and were a material part of his property. (R. 28.)

One transfer made in December, 1919, was of securities valued at $103,808, and the last two transfers, made in January, 1921, within eight months of his death, aggregated in value $669,095. (R. 28.) The last of these transfers, amounting to $334,170 was given in final equalization of advance-

ments made during the twenty preceding years to his five children and recorded in separate accounts kept by the decedent. (R. 15, 22, 23.) His will, executed in a hospital in Chicago in August, 1920, five months prior to this equalization, provided that all advancements should be charged to and deducted from his children's respective shares. (R. 18.) At about the same time decedent executed a postnuptial agreement with his wife to will her $100,000 in lieu of her statutory rights. The wife ratified all gifts made by the decedent to his children, either before or after the execution of the agreement. (R. 18.)

In April, 1920, eight months prior to the final transfer and equalization of the advancements to his children, decedent, while in California, became afflicted with ulcerative colitis, an aggravated form of dysentery. (R. 16.) Decedent's father had died of chronic dysentery. (R. 16.) Physicians advised decedent he had cancer of the intestines, and on July 9, 1920, he went to the Presbyterian Hospital in Chicago, where the disease was diagnosed as ulcerative colitis. (R. 17.) He remained at the hospital two months and a half. (R. 17, 19.)

In November, 1920, decedent returned to the hospital for an operation for ethmoiditis to relieve his asthma (R. 20), from which he had suffered for five years (R. 16). During his ten-day stay the treatment for ulcerative colitis was continued. (R. 20.)

In December, 1920, and January, 1921, decedent finally equalized the advancements to his children as above stated. (R. 21.)

In April, 1921, while in California, the decedent had a recurrence of the ulcerative colitis, which was then suspected to be cancer of the intestines. An operation was advised. (R. 26.) He returned to the Chicago hospital in June, 1921, for the fifth time, suffering from a virulent attack of the same disease that did not respond to treatment. (R. 26.) An abdominal operation to relieve the acute ulcerative colitis was performed on August 10, 1921. He died August 17, 1921. The death certificate gave as the cause of death "suppurative colitis" and its duration one year. (R. 26.)

The Commissioner of Internal Revenue determined that the three transfers were made in contemplation of death and included their value in decedent's gross estate. (R. 27.) The respondents paid the tax assessed and upon rejection of their claim for refund on the ground that the transfers were not made in contemplation of death (R. 27) brought this suit in the Court of Claims. That court upon its special findings of fact, which did not include any finding as to whether the transfers in question were made in contemplation of death, rendered judgment, as a conclusion of law from such findings, in favor of the plaintiffs for the sum of $83,683.62, with interest. The court's view of the law was stated in its opinion (R. 36), as follows:

Applying these facts to the rule that the term "contemplation of death" does not mean that general knowledge of all men that they must die, but that there must be a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand, and that such reasonable fear or apprehension must be the direct or animating cause, and the only cause of the transfer, it seems quite clear to us that the transfers in question were not made in contemplation of death.

SPECIFICATION OF ERRORS

The court below erred—

1. In holding that "contemplation of death" as used in 402 (c) of the Revenue Act of 1918 is limited to "a present apprehension, from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand."

2. In holding that "a transfer made in contemplation of death" as used in Section 402 (c) of the Revenue Act of 1918, means a transfer of which a reasonable apprehension of death near at hand is the direct, animating, and only cause.

3. In giving judgment for the respondents.

SUMMARY OF ARGUMENT

The history of taxation on gifts made in contemplation of death shows that there has been a tendency on the part of the legislatures and the courts

to broaden the meaning of the words "in contemplation of death" in order that the tax may be made effective. Early decisions construed these words as referring only to gifts *causa mortis*, but this definition has been abandoned in favor of constructions which, although at variance with each other, are becoming increasingly liberal. This Court has not had occasion to pass upon the meaning of the phrase as used in the Federal estate tax laws.

It is clear that the words "in contemplation of death" mean neither that knowledge which all men have that ultimate death is inevitable nor such an expectancy of death as is required in a gift *causa mortis*. Congress intended to tax certain gifts *inter vivos* which are made in lieu of those usually effected by will or by the operation of the intestacy laws. The character of such gifts is determined by the state of mind of the donor at the time they are made. If his purpose is to attain some object desirable to him during his life as distinguished from the distribution of his estate as at death, the gift is not of the character declared to be taxable. The Act provides that all gifts made within two years of death are presumed to have been made in contemplation of death unless the contrary is shown. Various types of evidence are available to the taxpayer for the purpose of rebutting this presumption. Of these the fact that the donor was in good health is only one, and is not sufficient to overcome the presumption if the donor was so far advanced in

years that death could not, in the nature of things, be far away.

The presumption may be overcome only by proof that the decedent in making the gift was actuated by an affirmative desire to achieve some purpose desirable to him in his lifetime. If the existence of such a purpose does not appear, the gift is presumed to have been testamentary in character and is therefore taxable.

In the instant case the gifts were made when the donor was over 70 years of age. The lower court did not find as a fact that the gifts were not made in contemplation of death. Nor did it find as a fact that they were made to fulfill some living purpose of the donor. At the time of the second and third transfers, the decedent was recovering from a severe illness which was of the same nature as that which eventually caused his death. The decision of the Court of Claims was founded on an erroneous interpretation of the Act placing undue emphasis on the decedent's physical condition as distinguished from his state of mind which alone established the character of the gift.

ARGUMENT

I

PRELIMINARY STATEMENT

Whether a transfer is or is not made "in contemplation of death" is a mixed question of law and fact. Involved in its determination is the interpretation of the words "in contemplation of death" as

used in the Revenue Act. The proper construction of these words is purely a question of law. The Court of Claims in the instant case held that a gift was not made in contemplation of death unless a present apprehension from some existing bodily or mental condition or impending peril creating a reasonable fear that death was near at hand was the direct or animating cause and the only cause of the transfer. (R. 36.) The Government submits that this interpretation of the statute is erroneous.

The words "in contemplation of death" were first used by Congress in the provisions relating to the estate tax imposed by the Revenue Act of 1916. These provisions have been reenacted in subsequent revenue legislation without substantial change, but the words in question have never been interpreted by this Court.

The provisions of the 1916 estate tax were modeled upon state statutes enacted prior to 1916. Taxation of testamentary transfers of property had long been familiar in law, the earlier inheritance, estate, or succession taxes being imposed only on transfers occasioned by death. Experience had shown that such taxation was rendered ineffective by reason of the fact that owners of large estates could avoid the tax by making transfers *inter vivos* when old age or sickness indicated the approach of death and so gifts *inter vivos*, made in contemplation of death, were subjected to the tax.

Pursuant to the general purpose to tax transfers normally made by will or succession, the legisla-

tures and the courts have shown a tendency to give meaning to the words "in contemplation of death" which will make the taxing statutes effective. Early decisions construed these words as referring only to gifts *causa mortis,* but this definition has been abandoned in favor of constructions which, although at variance with each other, are more consistent with the purpose of such provisions. A brief summary of the state statutes and decisions relating to the phrase "contemplation of death" is printed in Appendix B, *infra,* pp. 31–36.

This Court has had no occasion to construe the words "in contemplation of death" as used in the Federal estate tax laws. The case of *Shwab* v. *Doyle,* 258 U. S. 529, was disposed of on the ground that the Revenue Act of 1916 did not operate retrospectively to tax a transfer completed prior to its enactment. In *Shukert* v. *Allen,* 273 U. S. 545, 547, this Court remarked in passing that it was not argued that the transfer in question was effected "in contemplation of death as a device to escape taxes." But this was far from stating that an intent to evade is essential to taxability.

In *Nichols* v. *Coolidge,* 274 U. S. 531, it was said that the provision taxing transfers in contemplation of death was (p. 542)—

> necessary to prevent evasion and give practical effect to the exercise of admitted power.

In 1926 Congress substituted, with respect to transfers thereafter made, a two-year conclusive

presumption for the rebuttable presumption appearing in the earlier Acts. (Revenue Act of 1926, Section 302 (c) c. 27, 44 Stat. 70.) The reason for this change of policy appears in the report of the Committee on Ways and Means (House Rep. No. 1, 69th Congress, 1st Session, p. 15), which reads in part as follows:

> Under all the prior Revenue Acts, a gift or transfer of property by trust or otherwise without a fair consideration and within two years prior to the decedent's death is, unless shown to the contrary, deemed to be made in contemplation of death, and the amount of the gift or transfer is included in the gross estate of the decedent. The presumption, however, is rebuttable and has proved very ineffective in practical administration. * * * Experience under the Act of 1921 showed that the honest and scrupulous citizen paid the tax, but many less scrupulous found an easy way of evading it. This not only caused great loss in revenue to the Government, but was grossly unfair to those who paid the tax in good faith.

II

GIFTS MADE "IN CONTEMPLATION OF DEATH" ARE NOT LIMITED TO TRANSFERS INDUCED BY AN EXISTING CONDITION OF ILL HEALTH CAUSING APPREHENSION OF DEATH IN THE NEAR FUTURE

In defining the meaning of the phrase "in contemplation of death" it is necessary to view the

words in the setting in which they are found in the statute. Taken by themselves without reference to their context, they might mean that knowledge which all men have that ultimate death is inevitable, or, on the other hand, they might be taken to refer to an expectancy of immediate death such as is inherent in the making of a gift *causa mortis*. Viewed in the light of the purpose of the statute, their meaning lies between these two extremes.

The principle upon which death duties rest is that death is the "generating source" from which the authority to tax arises. See *Knowlton* v. *Moore*, 178 U. S. 41. Usually the event upon which the tax is imposed is a transfer or an enlargement of property rights caused by and taking effect at death—as where the property passes by will or by operation of the intestacy laws. *Tyler* v. *United States*, 281 U. S. 497. In such cases the incidence of the tax is clear.

When the class of transfers upon which the tax is imposed is enlarged to include transfers in contemplation of death, the scope of the Act must be determined in the light of its purpose. All courts agree that the expression "contemplation of death" refers to a state of mind, but the exact mental condition which the statute specifies can only be defined by the purpose sought to be accomplished. That purpose is not to tax all gifts *inter vivos*, but to include within the taxable class gifts which are similar in their nature to transfers of property by

will or by succession. The purpose of such inclusion is, of course, to bring within the taxable class gifts *inter vivos* which may fairly be included because testamentary in purpose, and thus to prevent the avoidance of taxes upon transfers which would normally accrue at death. The purpose of the statute to prevent avoidance of such taxation is emphasized in *Nichols* v. *Coolidge*, 274 U. S. 531, and *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177 (N. D. Cal.)

This controlling statutory purpose must fail of accomplishment if the words of the enactment are so narrowly construed as to include in the taxable class only gifts *causa mortis*, for it is obvious that many gifts *inter vivos* are made to avoid the payment of death duties, and to serve no other purpose, by persons who are in no immediate fear of death because of existing ill health.

Because of the practical difficulty of adducing positive proof as to the mental connection between a gift and death, Congress has declared that every transfer in the nature of a final disposition or distribution of a material part of one's property made within two years of death shall be presumed to have been made in contemplation of death. In other words, contemplation of death must be accepted as the fact until the contrary is shown. The burden is upon the taxpayer to prove that the gift was not of such a character.

Obviously, contemplation of death must have some causal connection with the gift. How imme-

diate or how potent the statute does not say, nor does it say how a gift presumed to have been made in contemplation of death may be shown not to have been so made. If, in view of the general purpose of the law, doubt remains, these questions may be resolved by a consideration of the circumstances which prompt men to make transfers of a material part of their possessions by way of final disposition thereof—transfers such as are usually reserved until death renders the property of no further use to its owner.

Common experience shows that such transfers are not normally made so long as the owner is relatively young and in good health. The donor's state of health, therefore, may furnish a valuable indication of the purpose of the gift, and consequently of its character. Influenced, no doubt, by the early New York decisions construing "contemplation of death" as the equivalent of *causa mortis* (see pp. 31–32, *infra*), a number of courts have considered that a gift made while the donor was well and vigorous can not have been made in contemplation of death within the meaning of the statute. This is on the assumption that contemplation of death means "expectation of immediate death" (*Gaither* v. *Miles* 268 Fed. 692, 694 (D. Md.)), or "anticipation of death in the immediate or reasonably distant future" (*Vaughan* v. *Riordan*, 280 Fed. 742, 743 (W. D. N. Y.)). In the instant case the Court of Claims

invoked this rule stated in *Rea* v. *Heiner,* 6 F. (2d) 389 (W. D. Pa.), where it was said (p. 392) that there must be "a present apprehension from some existing bodily or mental condition or impending peril, creating a reasonable fear that death is near at hand." Substantially the same language is found in *Flannery* v. *Willcuts,* 25 F. (2d) 951 (C. C. A. 8th), and *Beeler* v. *Motter,* 33 F. (2d) 788 (D. Kan.).

To give to the words "contemplation of death" the narrow meaning of "apprehension or fear of immediate death or death in the very near future" restricts the literal meaning of the Act and operates to defeat its acknowledged purpose, as the case at bar so clearly proves. The taxpayer's construction unduly stresses the physical condition of the donor and ignores his state of mind which alone fixes the character of the gift. Bodily and mental conditions at the time the gift is made are merely evidence of the donor's state of mind and can not be regarded as essential elements of a taxable transfer because the statute nowhere declares that they are. On the contrary, the statutory presumption that all gifts made within two years of death are made in contemplation of death, clearly shows that Congress did not regard infirmities of mind or body as essential to every gift made in contemplation of death.

In construing Section 402 (c) the Treasury Department has given weight to the donor's condi-

tion of health. Article 23 of Regulations 37 (1919 ed.), *infra*, pp. 30–31, declares that a transfer is made in contemplation of death—

> whenever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty.

But this statement is qualified by the provision which follows:

> The cause which induces such bodily or mental conditions is immaterial, and it is not necessary that the decedent be in the immediate expectation of death.

In other words, "bodily or mental conditions" does not refer solely to serious illness likely to result in death. What kinds of physical or mental conditions do influence a man to dispose of his property to those whom he deems proper objects of his bounty?

Undoubtedly if a man who is afflicted with a disease the severity of which he probably or demonstrably suspects or knows, makes a gift of a substantial part of his property, the evidence as to his health is strongly persuasive as to his state of mind and therefore as to the character of the gift. Conversely, freedom from illness at the time of the transfer tends to show that the donor was not concerned with the effect of death upon the devolution

of his estate. But we submit that proof of good health alone is not sufficient to rebut the statutory presumption that a transfer made within two years of death was made in contemplation of death.

Perhaps the most common bodily condition which prompts persons to dispose of their property by transfers testamentary in nature is that of advanced years. As the Prerogative Court of New Jersey said in *In re Bottomley's Estate*, 92 N. J. Eq. 202, 208, when a man has passed "the scriptural mark of three score years and ten," he must necessarily look upon death as being "not on the horizon of life but in its foreground, and, perhaps, very near." It is a bodily condition which induces that frame of mind, and existing freedom from a specific illness does not necessarily neutralize it.

We do not endorse the dictum of the District Court for the Northern District of California in *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177, *supra*, where it was said (p. 178) that—

> a person of comparative youth, enjoying good health, may nevertheless make a transfer of property, "in contemplation of death" within the meaning of that phrase.

So broad a construction of the statute would cover gifts made merely in that expectation of death which is common to all men at all times. But if advancing years overcome the desire to retain one's possessions during life and distribution of one's estate is made *inter vivos* to the natural ob-

jects of one's bounty, it is fair to say that approaching death has induced a final settlement of earthly affairs.

We submit, therefore, that in giving judgment for the plaintiff on the ground that the decedent was not, at the time of the transfers, under an apprehension of imminent death arising from an existing illness, the Court of Claims based its conclusion on an erroneous interpretation of the statute.

III

THE PRESUMPTION THAT A GIFT MADE WITHIN TWO YEARS OF DEATH WAS MADE IN CONTEMPLATION OF DEATH CAN BE OVERCOME ONLY BY PROOF THAT THE DONOR WAS ACTUATED BY A DESIRE TO ACHIEVE SOME PURPOSE DURING HIS LIFETIME AS DISTINGUISHED FROM ONE RELATED PRIMARILY TO THE DEVOLUTION OF HIS ESTATE AT DEATH

Because of the acknowledged purpose of the "contemplation of death" provision, some courts have shown a tendency to look for evidence of an intent on the part of the transferor to avoid the tax before holding a transfer taxable. In *Matter of Baird*, 219 App. Div. 418, 421, it was said that the words "in contemplation of death" have reference to a situation where expectation of imminent death based on an existing condition of ill health is the inducing cause of the transfer or—

> where a transfer is made "in bad faith" or so as "to evade" or "defraud the State of the tax" or "to cheat the law."

The danger of such a criterion is that it injects an element of fraudulent intent which is neither expressed nor implied in the language of the Act.

In *Kunhardt* v. *Bugbee*, 3 N. J. Misc. 1107, affirmed on reargument, 4 N. J. Misc. 692, the Supreme Court of New Jersey went to the opposite extreme in saying that whether the donor had or had not any thought of evading the tax was immaterial, provided the gift was of the kind declared to be taxable. And in *Shwab* v. *Doyle*, 269 Fed. 321, 329, the Circuit Court of Appeals for the Sixth Circuit said:

> Manifestly, the question of intent to evade has no pertinency to the case of a purely testamentary conveyance inter vivos.

Inasmuch as the character of the gift for purposes of taxation is determined by the motive actuating it, evidence of an intent to avoid the tax is convincing evidence that the donor was concerned with the distribution of his property in anticipation of his death. On the other hand, the absence of such evidence can not overcome the statutory presumption.

What affirmative proof, then, can the executors present for the purpose of showing that the transfer was not of the character declared to be taxable? Article 23 of Regulations 37 (1919 ed.) (*infra*, pp. 30–31) provides that—

> The presumption of taxability may be rebutted by proof that the transfer was not in-

duced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature.

If, as we contend, advanced age is a bodily condition that may lead to a state of mind sufficient to impress the gift with a taxable character, then, in order to overcome the presumption, evidence must be produced showing that the donor's distribution of his possessions is not merely in anticipation of his approaching death but is intended to accomplish some purpose desirable to him if he continues to live.

Manifestly there are some circumstances in which a man will in the normal course of human conduct dispose of a substantial portion of the property which he has accumulated to accomplish some purpose immediately in view without any expectancy of death either immediate or remote. The fact that men who are old and men who are ill frequently give away substantial portions of their estates and that men who are both young and well seldom do, shows forcibly that such gifts are usually made with death in view; nevertheless the nature of the gift may show the contrary. Since the application of the law depends on the character and incidents of the transfer itself, and since the law covers only such transfers as are of a testamentary character, assistance may be derived from a consideration of incidents such as would not ordinarily be present in a transfer by will or succession. In

other words, affirmative evidence should be produced that the transfer served some living purpose of the donor, if the presumption is to be overcome.

In those cases in which the transfers have been held not in contemplation of death there has always been proof that the donor wished to accomplish some purpose during his own lifetime and was induced by such a desire to make the gift. Thus transfers made for the purpose of relieving the donor of the cares of management or in order that his children may experience the responsibilities of business under his guidance and supervision have been held to be of that character. *Flannery* v. *Willcuts*, 25 F. (2d) 951 (C. C. A. 8th), *supra*; *Tips* v. *Bass*, 21 F. (2d) 460 (W. D. Tex.); *White* v. *Commissioner*, 15 B. T. A. 470; *Gimbel* v. *Commissioner*, 11 B. T. A. 214. Similarly, where the donor in order to reduce income taxes has transferred property to others, his purpose has been recognized as one pertaining to his lifetime and not in contemplation of death. *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.), *supra*.

On the other hand, there may be evidence of a definite purpose, other than the avoidance of taxation, which is nevertheless a purpose having to do with death rather than with life. Thus in *In re Benton's Estate*, 234 Ill. 366, it appeared that the donor wished to prevent certain property from falling into the hands of a stepson through the exercise of the widow's right to take against the will. The

Supreme Court of Illinois held, and we believe properely so, that the transfer was of the kind declared to be taxable.

Various other considerations may throw light on the testamentary or nontestamentary character of the gift. Whether the transfer affected a large or small part, relatively, of the donor's estate has been held a factor of great if not controlling weight. *Flannery* v. *Willcuts*, 25 F. (2d) 951 (C. C. A 8th), *supra*; *Rengstorff* v. *McLaughlin*, 21 F. (2d) 177 (N. D. Cal.), *supra*; *Vaughan* v. *Riordan*, 280 Fed. 742 (W. D. N. Y.), *supra*; *Gaither* v. *Miles*, 268 Fed. 692 (D. Md.), *supra*; *Beeler* v. *Motter*, 33 F. (2d) 788 (D. Kan.), *supra*. Similarly, the fact that the donor was in the habit of making allowances from his income to those dependent upon him may tend to show that the transfer in question was effected for some definite living purpose and was not made in contemplation of death.

We contend that all these factors must be given due consideration if the purpose of the Act is not to be defeated. While the ultimate question is one of fact, as to whether the transfer in question has taxable characteristics, the determination of that fact must be controlled by an understanding of the legal significance of the words "in contemplation of death." We submit that the significance given to that phrase by the Court of Claims was clearly erroneous.

IV

IF THE DEFINITION OF A GIFT IN CONTEMPLATION OF DEATH ADOPTED BY THE COURT OF CLAIMS IS TOO NARROW, THE JUDGMENT IS NOT SUPPORTED BY THE FINDINGS OF FACT AND SHOULD BE REVERSED

The findings of the Court of Claims do not state, as a fact, that the decedent was or was not contemplating death at the time when the three transfers in question were made. They merely describe the circumstances surrounding each transfer. From such circumstances the court concluded as a matter of law that the gifts were not taxable. We believe that the salient facts bearing on the character of the gifts demonstrate that these facts, when subjected to the legal tests outlined above, do not justify the conclusion reached by the court.

All facts required to bring the statutory presumption into play are present in the instant case. All three transfers were made within two years of death. They were of a material part of the estate. (R. 28.) They were in the nature of a final disposition or distribution to natural objects of the donor's bounty, and were without consideration. The burden is therefore upon the executors to show they were not made in contemplation of death.

When the first transfer took place on December 24, 1919, the decedent was nearly seventy-two years of age. He died approximately one year and eight months later. The facts on which the Court of

Claims relied as overcoming the presumption were that the decedent was in good health, that in making the gift he was following out a definite policy of distributing property among his children during his life, and that the gift to his son, Artemus, was in recognition of his services to a company in which the decedent was vitally interested.

We submit that the fact that Mr. Wells was suffering from no illness at the time of the transfer is not sufficient, in view of his age, to rebut the presumption. Nor do the other facts to which the court referred show that the decedent was concerned with a purpose which he desired to see achieved during his life.

As early as 1901 Mr. Wells had started making advancements to his children in order that he might discover how capable they were of managing substantial amounts of property. Of these advancements he kept careful record (R. 15), and it is apparent that he always contemplated that they should be taken into account in the final distribution of his estate: His will, executed in August, 1920, contains specific instructions to that effect. (R. 18, 19.) But in 1919 he had had ample opportunity to test the business acumen of his children, and we submit that there is every reason to infer that the transfers here involved represented the fruits of his experience rather than the continuation of the policy of experimentation.

With respect to such advancements, Article 23 of Regulations 37 (*infra*, p. 31) provides as follows:

> The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death.

The findings do not state that any of the advancements in question were made for the purpose of developing business ability in his children. They merely show the existence of the general policy. We submit, therefore, that the facts found are not sufficient to warrant the conclusion which the court reached.

The court below said in its opinion (R. 33) that the "moving cause" for the gift of stock to Artemus Wells was a recognition of the services rendered by him to J. W. Wells Lumber Company. It suffices to say that no evidence of such a motive appears in the findings. Moreover, this would not explain the gift of 73 shares to the other son, Daniel.

The other two transfers which were considered by the Commissioner to have been made in contemplation of death, took place on January 1, 1921, and January 26, 1921, respectively. At that time the decedent had for several months been suffering from ulcerative colitis, a form of dysentery. This

condition first appeared in April, 1920, and in June of that year the decedent was informed by a physician in California that he had cancer of the intestines. (R. 16, 17.) In July, 1920, he entered a hospital, where he remained for more than two months under treatment. Although the condition was severe, Mr. Wells was told by the doctor that he would recover. (R. 17.)

There can be little doubt that he took his illness seriously. Shortly after entering the hospital, he executed an agreement stating that by reason of his illness he wished to provide for his wife in the manner therein set forth. (R. 18.) By the agreement his wife ratified all gifts made by Mr. Wells to his children and Mr. Wells agreed to execute a will leaving to his wife the sum of $100,000. This clearly shows that he had in mind the possibility that his illness would prove fatal. At about the same time and while he was still in the hospital, he executed a new will in which were incorporated the provisions of the agreement. (R. 18.)

On returning home from the hospital in September, 1920, Mr. Wells told his son, Artemus, that he was completely cured. In November he returned to the hospital for an operation designed to relieve an asthmatic condition. While there he received further treatment for the ulcerative colitis which the hospital records showed had not entirely cleared up. (R. 20.)

In December, 1920, shortly after his return from the hospital, he spent considerable time equalizing the advancements he had made to his children by adding interest upon the respective debit balances. (R. 21.) On December 31, 1920, he transferred 68,985 shares of stock of the Girard Lumber Company to his children, and the adjusted accounts of the advancements as of January 1, 1921, were marked "cancelled" and "balanced to date as a gift." (R. 21.)

It seems clear that in transferring this stock and balancing and closing the respective accounts, the decedent was no longer pursuing his policy of making advancements to his children for the purpose of testing their business ability. The tests had been continued over a period of twenty years. The decedent had recently passed through a serious and painful illness and, although he had been pronounced cured, there must have been in his mind the thought that a man of his age, having once been afflicted with an ailment of that nature, must face the possibility that death was reasonably near at hand. The physical circumstances alone would justify this supposition, but we have the additional fact that the decedent believed his father's death to have been caused by the same disease from which he himself had suffered. (R. 16.) This must inevitably have contributed to the realization that he might not have much longer to live.

The optimistic statements which the decedent made to his family and friends are not necessarily

indicative of his true state of mind. He had been an active man, living a busy life, and such men are not usually prone to admit to others—least of all to their immediate families—that they are no longer as vigorous as they used to be. Moreover, the decedent was much concerned with putting his affairs in order in anticipation of death.

In December, 1920, when the transfer of stock of the Girard Lumber Company took place, the decedent was on a diet and was taking bismuth for his intestinal condition. Under these circumstances he must have realized that there was a possibility of the colitis recurring. Ten days after making the transfer, he returned to the hospital for a further operation to relieve his asthma, and the hospital records show that the colitis was still present to a slight degree. Upon his discharge on January 14, 1921, he was instructed to continue with the diet which had been prescribed.

On January 26, 1921, the decedent made the third and last of the transfers here involved, in the form of a trust agreement whereby he assigned to a trustee 3,713 shares of stock of the Lloyd Manufacturing Company to be exchanged by the trustee for a like number of shares of stock of a proposed corporation, which were to be distributed among the decedent's children within sixty days of issue. (R. 23.) At about the same time he wrote to his son Ralph and to his daughter Edna, advising

them of the transfers and of the manner in which the various advancements were to be equalized. (R. 24.)

Shortly afterwards Mr. Wells went to California, where for two months he appeared to enjoy relatively good health. (R. 25.) In the middle of April he had a recurrence of the ulcerative colitis. On June 5, 1921, he reentered the hospital in Chicago, where he died on August 17, 1921, after an operation. The death certificate gave suppurative colitis as the cause of death, and stated that its duration was one year. (R. 26.)

We submit the facts show that in making all three transfers, the decedent was actuated by the thought of death and its consequences. It is true that in 1919 he was free from illness, but it is also true that he was at that time almost 72 years of age. If, as we contend, a condition of ill health does not constitute the final test, and age is a bodily or mental condition such as may induce a man to make a final disposition of his property, then we submit that the presumption has not been successfully overcome. *Luscomb* v. *Commissioner*, 30 F. (2d) 818 (C. C. A. 2d); *Schaefer* v. *Lucas*, 44 F. (2d) 476, 488 (C. C. A. 4th).

With respect to the transfers in 1921, the facts show that the decedent had been seriously ill and that these gifts had been made almost immediately after his apparent recovery. This, together with

his age, is, we submit, persuasive evidence that he was putting his affairs in order with the thought that death might not be far away.

CONCLUSION

The judgment of the Court of Claims should be reversed.

Respectfully submitted.

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APPENDIX A

STATUTES AND REGULATIONS INVOLVED

STATUTE

Section 402 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, provided in part as follows:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Article 23 of Regulations 37 (1919 ed.) promulgated under the Revenue Act of 1918, provides in part as follows:

> ART. 23. *Nature of transfer.*—The words "in contemplation of death" do not refer to

the general expectation of death which all persons entertain. A transfer, however, is made in contemplation of death whenever the person making it is influenced to do so by such an expectation of death, arising from bodily or mental conditions, as prompts persons to dispose of their property to those whom they deem proper objects of their bounty. The cause which induces such bodily or mental conditions is immaterial; and it is not necessary that the decedent be in the immediate expectation of death. * * * Transfers made within two years of a decedent's death are presumed to be taxable if they are of a material part of his property and are in the nature of a final disposition thereof. * * * All facts relating to the transfer should be stated, including the motive therefor, the decedent's state of health, and his anticipation of death. The presumption of taxability may be rebutted by proof that the transfer was not induced by bodily or mental conditions leading the grantor to make a disposition of property testamentary in its nature. The fact that a gift was made as an advancement, to be taken into account upon the final distribution of the decedent's estate, is not enough, standing alone, to establish taxability; but it is a circumstance to be considered in determining whether the transfer was made in contemplation of death.

Appendix B

SUMMARY OF STATE STATUTES AND DECISIONS RELATING TO "CONTEMPLATION OF DEATH"

In 1891 New York amended its transfer tax act to include transfers made in contemplation of the

death of the donor. N. Y. Laws, 1891, c. 215, p. 409. Despite the obvious purpose of this amendment the New York courts at first took the position, following a dictum appearing in *Matter of Seaman*, 147 N. Y. 69, 76, that the term "in contemplation of death" referred only to gifts *causa mortis* and that consequently a transfer which was complete and irrevocable prior to the death of the transferor was not subject to the tax. *Matter of Edgerton*, 35 App. Div. 125; *Matter of Spaulding*, 49 App. Div. 541; *Matter of Baker*, 83 App. Div. 530, affirmed, 178 N. Y. 575. But in *Matter of Crary*, 31 Misc. 72, a different view of the statute was taken, and it was held that it applied to gifts *inter vivos* in which a contemplation of death was the sole motivating cause.

The rule restricting the application of the statute to gifts *causa mortis* has been definitely abandoned in New York, but the earlier cases still appear to exert some influence upon the definition of the phrase by confining its application to cases in which the transferor was in such a physical condition as to make it appear that death was imminent. *Matter of Price*, 62 Misc. 149; *Matter of Dee*, 148 N. Y. Supp. 423, affirmed, 161 App. Div. 881, affirmed, 210 N. Y. 625; *Matter of Hodges*, 215 N. Y. 447.

The Illinois statute is substantially the same as the New York Transfer Act, but the Illinois Courts have at all times refused to be guided by the early New York decisions. In the leading case of *Rosenthal* v. *People*, 211 Ill. 306, 309, the Supreme Court of Illinois said:

> While the statute was doubtless not intended to impose limitations on the right of

> a person to give away his property whenever he might see fit, the intention clearly was to tax property passing by will or the intestate laws of the State, or by such gifts or transfers as are of like nature and can properly be classed therewith.

In *People* v. *Carpenter*, 264 Ill. 400, 408, the Court inserted into the definition the requirement that the transfer be motivated by an "apprehension of death which arises from some existing infirmity or impending peril," citing as authority the *Rosenthal case* and the case of *In re Benton's Estate*, 234 Ill. 366, in neither of which did such a qualification appear.

The Wisconsin Courts appear to have departed from the original definition set forth in the leading case of *State* v. *Pabst*, 139 Wis. 561, 590, in which it was said:

> The words are evidently intended to refer to an expectation of death which arises from such a bodily or mental condition as prompts persons to dispose of their property and bestow it on those whom they regard as entitled to their bounty.

In the later case of *State* v. *Thompson*, 154 Wis. 320, 328–329, the above definition was quoted with approval but the Court then said that this definition meant the same as that given in the New York case of *Matter of Baker*, 83 App. Div. 530, affirmed, 178 N. Y. 575, which referred to an apprehension of death arising from an existing physical condition.

The California legislature in 1911 amended the earlier acts of that State by inserting into them a definition of the term "in contemplation of death,"

which it said (Cal. Stats. 1911, c. 395, sec. 27, p. 726)—

> shall be taken to include that expectancy of death which actuates the mind of a person on the execution of his will, and in no wise shall said words be limited and restricted to that expectancy of death which actuates the mind of a person in making a gift *causa mortis*.

The Supreme Court of California has held that this amendment merely elucidated without changing the law by giving fuller expression to the legislative intent. *In re Reynold's Estate*, 169 Cal. 600; *Chambers* v. *Larronde*, 196 Cal. 100. In a case arising under the statute enforced prior to 1911 it had been held that the New York rule making a transfer in contemplation of death equivalent to a gift *causa mortis* was too strict and would not be followed. *Abstract and Title Guaranty Company* v. *State*, 173 Cal. 691.

In the case of *Chambers* v. *Larronde*, *supra*, the Supreme Court of California said (p. 112):

> For a transfer to be "in contemplation of death" it is not, as stated, necessary that the transferor be in fear of immediate death from an existing malady, as in a gift *causa mortis*, but, on the contrary, it is conceivable that a person of comparative youth, enjoying perfect health and vigor, may, nevertheless, make a transfer of his property "in contemplation of death" within the meaning of the act.

Somewhat similar language was used by the District Court for the Northern District of California in construing the Revenue Act of 1918. *Reingstorff* v. *McLaughlin*, 21 F. (2d) 177.

The Ohio Statute defines contemplation of death as "that expectation of death which actuates the mind of a person on the execution of his will." Section 5331 of the Ohio General Code, as amended by Ohio Laws, 1929, p. 682. In the case of *Tax Commissioner* v. *Parker,* 117 Ohio St. 215, the Supreme Court of that state held taxable gifts made by a man who, although seventy-four years old when he died, had no expectation of immediate death until a few days before it took place. The Court said (p. 223):

> * * * nor do we think the realization that he was soon to die controlling in determining whether the gift was made in contemplation of death. While we regard the evidence upon that subject as competent and entitled to be considered in connection with other facts, we are of the opinion that the controlling fact in determining whether a gift is made in contemplation of death is whether the gift was in the nature of a distribution of property rather than the bestowal of a favor upon the donee.

In *Armstrong* v. *State,* 72 Ind. App. 303, decided by the Court of Appeals of Indiana in 1918, we find a definition typical of those more recently expressed by the Courts in states where the phrase "in contemplation of death" has not been expressly defined by statute. The Court said (p. 315):

> The words "in contemplation of death," as used in inheritance tax statutes, do not refer to that general expectation of death entertained by all persons, but they do refer to that expectation of death which arises from such bodily or mental conditions, irrespective of the cause in any particular case, which prompts persons to dispose of their property

> to those they deem entitled to their bounty. Those words when employed in taxation statutes are not restricted to the technical meaning of such phrases when applied to gifts *causa mortis,* but are given a reasonable and literal interpretation, which tends to make effectual such taxation laws without destroying the right of the owner of the property to make an absolute gift of the same.

It is to be observed that this definition bears great similarity to the Treasury Regulations, promulgated under the Revenue Act of 1918 (Reg. 37, Art. 23, *supra,* pp. 30–31).

In 1903, Michigan, the State of which the decedent, Mr. Wells, was a resident, enacted a transfer tax act, containing a clause taxing gifts made in contemplation of death. Michigan Public Acts, 1903, p. 277, No. 195. The provisions of this Act are almost identical with those of the New York law, but there are no decisions by the Michigan courts indicating the manner in which it has been construed.

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